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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JOSE MELCHOR, a Minor, etc., et al.,

Plaintiffs and Appellants,

v.

CHILDREN'S HOSPITAL & RESEARCH CENTER OAKLAND,

Defendant and Respondent.

A126791

(Alameda County Super. Ct. No. RG06302527)

Jose and Natalie Melchor (collectively, plaintiffs), by and through their guardians ad litem, sued various defendants, including Children's Hospital & Research Center Oakland (CHO or the hospital) for professional negligence. The operative first amended complaint alleged the negligent examination, diagnosis, and treatment provided by CHO and its nonemployee physicians, including Dr. Heidi Flori, caused plaintiffs to contract herpes type II meningoencephalitis and to develop cerebral palsy.[1]

In March 2009, CHO filed two motions for summary judgment — one against Jose and another against Natalie — contending plaintiffs could not establish the hospital breached the standard of care with respect to the treatment and care plaintiffs received.

[1] We refer to Jose and Natalie by their first names to avoid confusion.

CHO supported its motion for summary judgment against Jose with a declaration from Dr. Scott J. Soifer, who opined the treatment and care provided by CHO and Dr. Flori met the standard of care. CHO supported its motion for summary judgment against Natalie with a similar declaration from another doctor. The court granted both motions and entered judgment for CHO.[2]

On appeal, plaintiffs contend the court erred by granting CHO's motion for summary judgment against Jose because: (1) Dr. Soifer's declaration was inadmissible pursuant to Health and Safety Code section 1799.110, subdivision (c);[3] (2) the court "erroneously shifted the burden of proof" to plaintiffs "to prove their case at the summary judgment stage;" and (3) CHO is liable for Dr. Flori's "inaction . . . on the theory of ostensive agency." We affirm.

FACTUAL AND PROCEDURAL HISTORY

Because plaintiffs do not challenge the grant of summary judgment against Natalie, we discuss only those facts relevant to CHO's motion for summary judgment against Jose.[4]

In December 2006, plaintiffs filed a complaint against CHO and others, alleging defendants were negligent in the examination, diagnosis and treatment of plaintiffs'

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[2] The trial court granted the remaining defendants' motions for summary judgment, and we affirmed. (See *Melchor v. Children's Hospital of Oakland*, A122942, July 22, 2009; *Melchor v. Fresno Community Hospital and Medical Center*, A124445, Aug. 30, 2010; *Melchor v. Mercy Medical Center Merced*, A12448, Aug. 30, 2010; and *Melchor v. Pena*, A124449, Aug. 30, 2010.)

[3] Unless otherwise noted, all further statutory references are to the Health and Safety Code.

[4] Plaintiffs' opening brief is virtually devoid of citations to the record; the few citations provided are simply lists of inaccurate citations at the ends of three paragraphs. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Stasz v. Schwab* (2004) 121 Cal.App.4th 420, 424 & fn. 1.) Moreover, plaintiffs' assert statements of "fact" that are frequently expressions of argument, unsupported by authority in the record. We have exercised our discretion to consider the merits of plaintiffs' appeal, but "we do not accept [plaintiffs'] factual assertions and rely instead on [CHO's] statement of facts, which is supported by appropriate record references." (*Id.* at p. 424, fn. 1.)

condition, which caused them to contract herpes type II meningoencephalitis and to develop cerebral palsy. In August 2008, CHO filed two motions for summary judgment based on the declaration of a CHO nurse who opined that the care and treatment provided by the CHO nurses met the standard of care. In opposition, plaintiffs claimed they were not alleging the hospital's nurses breached the standard of care, but rather that various nonemployee physicians at CHO, including Dr. Flori, breached the standard of care and were ostensible agents of the hospital. The court denied CHO's summary judgment motions without prejudice and allowed plaintiffs to amend the complaint to allege a claim for ostensible agency based on the services provided by nonemployee doctors working at CHO. In November 2008, plaintiffs amended the complaint to add allegations that Dr. Flori was an agent of CHO.

CHO's Second Motion for Summary Judgment

In March 2009, CHO filed a second motion for summary judgment against Jose. In its separate statement of undisputed facts, the hospital asserted the following based on supporting evidence.

Fraternal twins Jose and Natalie were born on February 4, 2002, at Fresno University Medical Center at 34 weeks' gestational age. Jose was discharged from University Medical Center on February 13, 2002. On February 22, 2002, Jose began vomiting and his parents took him to Mercy Medical Center Merced (Mercy). Shortly thereafter, Mercy decided to transfer Jose to CHO to provide him with a higher level of care.

Jose arrived at CHO on February 22, 2002, and was admitted to the hospital by Dr. Flori, the attending physician. The nurse who examined Jose noted three reddened circular lesions on his left forearm and informed Dr. Flori. Dr. Flori consulted with a neonatologist who recommended a number of tests and treatment. Dr. Flori followed the neonatologist's advice. At that time, Jose's doctors were concerned about the possibility of a bacterial or viral infection.

The next day, Jose was transferred to the hospital's pediatric intensive care unit. Over the next two days, hospital staff monitored Jose and performed various tests to

determine the possible causes of his illness. On February 26, 2002, a nurse noted a lesion on Jose's abdomen. Later that day, Jose was diagnosed with herpes type II and began receiving medication to treat it.

The hospital's expert witness, Dr. Soifer, opined that "[t]he care and treatment provided by Dr. Flori to Jose [ ] met the standard of care. At the time of admission it was not evident that Jose was suffering from a Herpes infection. The symptoms exhibited by Jose, specifically apnea, lethargy, and increased heart rate are not specific to Herpes, given Jose's clinical history and condition, there was no reason to suspect a Herpes infection at the time Jose was admitted to CHO by Dr. Flori."

Jose's Opposition to the Summary Judgment Motion

Jose contended Dr. Flori's treatment fell below the standard of care, but he did not offer any expert testimony to dispute Dr. Soifer's opinions. Instead, he claimed — as he does on appeal — that Dr. Soifer was not qualified to testify as to the standard of care and that CHO was liable for Dr. Flori's alleged negligence.

The Court's Order Granting Summary Judgment

The court granted CHO's motion for summary judgment against Jose, concluding it was undisputed the hospital "did not breach the standard of care with respect to the care and treatment provided" to Jose and that "no act or omission on the part of the physicians or nursing staff at [CHO] caused the injuries claimed by Plaintiff Jose Melchor." The court also overruled Jose's objections to Dr. Soifer's declaration. The court entered judgment for CHO.

DISCUSSION

When reviewing the grant of a motion for summary judgment, we conduct an independent review to determine whether there is a triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860; *Buss v. Superior Court* (1997) 16 Cal.4th 35, 60; *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1485.) We construe the moving party's evidence strictly, and the nonmoving party's evidence liberally, to determine whether there is a triable issue. (*See D'Amico v.*

Board of Medical Examiners (1974) 11 Cal.3d 1, 20, disapproved on other grounds in *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 944; *Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72 (*Thomas*).) A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc. § 437c, subd. (p)(2).) The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue. (*Ibid.;Thomas, supra,* 98 Cal.App.4th at p. 72.)

The Court Properly Admitted Dr. Soifer's Declaration

Relying on *Van Horn v. Watson* (2008) 45 Cal.4th 322 (*Van Horn*), plaintiffs contend the court erred by admitting Dr. Soifer's declaration because Dr. Soifer did not have experience working in an emergency room. Plaintiffs' reliance on *Van Horn* is puzzling. In that case, the California Supreme Court determined that section 1799.102 — which immunizes those who render emergency care at the scene of an emergency from civil damages — applies only to the rendering of emergency *medical* care at the scene of a medical emergency. (*Van Horn, supra,* at p. 327.) *Van Horn* does not assist plaintiffs because the court in that case did not address the admissibility of expert testimony on the issue of nonemergency medical care rendered at a hospital. In this case, Dr. Flori examined Jose in a nonemergency setting: she was the attending physician in the pediatric intensive care unit who admitted Jose to the hospital.

Plaintiffs' reliance on section 1799.110, subdivision (c) is equally misplaced. Plaintiffs seem to contend Dr. Soifer was not qualified to opine on the standard of care because he did not, as required by section 1799.110, have substantial experience as an emergency room physician within five years of the date of trial. Section 1799.110, subdivision (c) declares: "In any action for damages involving a claim of negligence against a physician and surgeon providing emergency medical coverage for a general acute care hospital emergency department, the court shall admit expert medical testimony only from physicians and surgeons who have had substantial professional experience within the last five years while assigned to provide emergency medical coverage in a

general acute care hospital emergency department. For purposes of this section, 'substantial professional experience' shall be determined by the custom and practice of the manner in which emergency medical coverage is provided in general acute care hospital emergency departments in the same or similar localities where the alleged negligence occurred." (Fn. omitted.)

Section 1799.110, subdivision (c) "is part of a larger Good Samaritan statutory enactment, the intent of which was 'to promote the provision of emergency medical care by giving dedicated emergency room physicians a measure of protection from malpractice claims.' Thus, the section requires that an expert testifying in a malpractice action as to the standard of care must be one who has 'substantial professional experience' in providing emergency medical services in an emergency room." (*Petrou v. South Coast Emergency Group* (2004) 119 Cal.App.4th 1090, 1093, citations omitted.)

Section 1799.110, subdivision (c) does not apply here because Dr. Flori was not providing emergency medical care for the hospital's emergency department. She was the attending physician in the pediatric intensive care unit. In fact, plaintiffs concede Dr. Flori "did nothing of an emergency nature." As a result, Dr. Soifer was qualified to testify regarding Dr. Flori's treatment and care of Jose and the court properly admitted his declaration.

The Court Properly Granted Summary Judgment Against Jose

We reject plaintiffs' next contention that the court somehow "erroneously shifted the burden of proof to the plaintiffs" to "prove their case at the summary judgment stage." In its second motion for summary judgment, CHO contended its care of Jose met the applicable standard of care. As discussed above, it supported this contention with expert witness testimony that CHO and Dr. Flori did not breach the standard of care or cause Jose's alleged damages. From this evidence, a trier of fact could reasonably conclude: (1) Dr. Flori did not commit medical malpractice; and (2) CHO was not liable for Jose's injuries.

The burden therefore shifted to plaintiffs to produce evidence establishing a triable issue of material fact. In particular, plaintiffs were required to come forward with

conflicting expert evidence. It is well settled that expert opinion testimony is "required to prove or disprove that the defendant performed in accordance with the prevailing standard of care [citation], except in cases where the negligence is obvious to laymen." (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523.) "'California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence.' [Citations.]" (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985.) Plaintiffs did not produce evidence sufficient to demonstrate a triable issue of material fact: they did not submit any expert evidence from which a trier of fact could conclude Dr. Flori breached the standard of care or caused Jose's injuries. Nor did they submit any evidence to support their assertion that Dr. Flori was negligent, or that CHO could be liable on their claims. Therefore, the court properly granted CHO's motion for summary judgment against Jose.

Plaintiffs' final argument — that CHO is liable for Dr. Flori's negligence — also fails. Plaintiffs contend they sufficiently alleged Dr. Flori was an agent of the hospital, but this argument misses the point. In its second motion for summary judgment, the hospital contended Dr. Flori met the standard of care, and it supported this contention with an expert declaration. As noted above, plaintiffs did not demonstrate a triable issue of fact; they did not submit any expert evidence from which a trier of fact could conclude that Dr. Flori breached the standard of care or that anything Dr. Flori did or did not do was the cause of Jose's injuries. Nor did plaintiffs submit any evidence to support their assertion that CHO was liable. CHO therefore demonstrated Dr. Flori was not negligent, regardless of whether she was an agent of the hospital.

DISPOSITION

The judgment is affirmed. CHO is entitled to costs on appeal.

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Jones, P.J.

We concur:

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Simons, J.

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Needham, J.